IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. MICHAEL T. SHARP

Direct Appeal from the Criminal Court for Campbell County
No. 12167 E. Shayne Sexton, Judge

No. E2006-00638-CCA-R3-CD - Filed December 13, 2007

Defendant, Michael T. Sharp, was indicted on four counts of rape of a child, four counts of aggravated sexual battery, four counts of incest, two counts of sexual exploitation of a minor, and two counts of aggravated sexual exploitation of a minor. Following a jury trial, Defendant was found not guilty of the twelve counts of the indictment involving the charges of rape of a child, aggravated sexual battery, and incest. Defendant was found guilty of sexual exploitation of a minor, a Class E felony, in counts thirteen and sixteen of the indictment, and guilty of the lesser included offense of sexual exploitation of a minor in counts fourteen and fifteen. At the conclusion of the hearing on Defendant's motion for new trial, the trial court dismissed Defendant's convictions in counts thirteen and sixteen of the indictment upon finding that there was a material variance between the indictment and the evidence introduced at trial as to these counts. Following a sentencing hearing, the trial court denied Defendant's request for alternative sentencing and sentenced Defendant to two years for each conviction. The trial court ordered the sentences to be served consecutively, for an effective sentence of four years. On appeal, Defendant argues that the trial court erred in not merging his two convictions of sexual exploitation of a minor, and that the trial court erred in its sentencing determinations. The State argues on appeal that the trial court erred in dismissing counts thirteen and sixteen of the indictment. After a thorough review, we conclude that the trial court erred in dismissing counts thirteen and sixteen of the indictment based upon a fatal variance. However, we conclude that the charges against Defendant were multiplicitous. Accordingly, we reverse and dismiss counts fourteen, fifteen, and sixteen and remand to the trial court for entry of an amended judgment reflecting a conviction in count thirteen for the offense of sexual exploitation of a minor. In light of *State v. Gomez*, _____ S.W.3d _____ (Tenn. 2007), we modify Defendant's sentence for sexual exploitation of a minor in count thirteen to one year. We affirm the trial court's denial of alternative sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part, Modified in Part, Dismissed in Part, Reversed in Part, and Case Remanded

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Michael G. Hatmaker, Jacksboro, Tennessee, (on appeal); and Debra Graham, Oak Ridge, Tennessee, (at trial), for the appellant, Michael T. Sharp.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William Paul Phillips, District Attorney General; and Scarlett W. Ellis, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Because Defendant was acquitted of the charges of rape of a child, aggravated sexual battery and incest committed against the minor victims, we will review only the evidence supporting his convictions of sexual exploitation of a minor. The minor victims will be referred to by their initials.

K.S., who was ten years old at the time of the trial, testified that Defendant, whom she called "Mic-Mic," was her uncle. K.S. said that Defendant took photographs of her and her sister, S.S., while they were undressed. These photographs were taken in various locations in Defendant's house including the bathroom and kitchen. Defendant copied the photographs onto his computer and then showed them to K.S. K.S. stated that Defendant showed her other digital images of children on his computer, whom she described as "making love with their daddy and dogs and monkeys and stuff." Defendant told K.S. that "[t]his is what I want you to do to me."

S.S., K.S.'s sister, was eight years old at the time of trial. S.S. testified that Defendant took photographs of her while she was undressed. S.S. said that on one occasion Defendant made her do a hand-stand by the refrigerator, and on another occasion, he made her sit in a basket. S.S. said that she was nude on both occasions. S.S. stated that she never saw the photographs of herself, and Defendant did not show her any digital images on her computer. K.S. showed S.S. a piece of paper with "some little kids naked on it," which S.S. believed was printed out from Defendant's computer.

Bobby Vann testified that he was an investigator with the Campbell County Sheriff's Department at the time of the offenses. Mr. Vann stated that he and another deputy executed a search warrant on Defendant's residence on September 2, 2003, and seized the hard drive of Defendant's computer, a compact disk, and a floppy disk. Mr. Vann said that the items were stored in the department's evidence room until they were transported to the Knoxville Police Department seven to ten days later.

Investigator Mel Pierce with the Knoxville Police Department testified that he was a member of the federally funded Internet Crimes Against Children Task Force and assisted other Tennessee counties with investigations concerning child pornography. Investigator Pierce stated that on September 12, 2003, he received a compact disk with a label on it, an unlabeled floppy disk, and a computer tower, all of which belonged to Defendant, from the Campbell County Sheriff's Department. An examination of Defendant's hard drive revealed a file folder entitled "Mic-Mic."

The file contained digital or JPEG images of children engaged in various sexual acts or simulated sexual acts.

Investigator Pierce interviewed Defendant at his residence on April 28, 2004. Defendant acknowledged that he downloaded items such as music and videos from the Internet on to his hard drive using a peer-to-peer file sharing software called kazaa. Investigator Pierce explained in his testimony that a file sharing network allows a number of users to connect to the site and share files with each other. Investigator Pierce said that Defendant acknowledged that he frequently photographed K.S. and S.S. Defendant described one photograph of S.S. which had been taken of the child's bottom as she got out of the bathtub. Defendant told Investigator Pierce that he had deleted the photograph from his hard drive. Defendant told Investigator Pierce that he had seen file names and images suggestive of child pornography on his computer.

On cross-examination, Investigator Pierce said that Defendant told him that other people had access to his computer. Investigator Pierce stated that child pornography web sites are not readily accessible on the internet but can be located if the user knows what to look for.

David Slagle, a special agent with the T.B.I., testified that he interviewed Defendant on September 10, 2003, in connection with the investigation of K.S.'s and S.S.'s allegations against him. Defendant acknowledged during the interview that he had downloaded digital images of adult pornography from the internet. Defendant denied, however, that he had ever intentionally downloaded pornographic images of children and said that had he done so, he would have deleted the images. Defendant said that one of the children had opened the kazaa program on his computer by mistake on one occasion, and on another occasion one of the children viewed some adult pornographic images he maintained on a compact disk and which he had mistakenly left in his computer. Defendant denied, however, that he had ever shown K.S. or S.S. any pornographic images on his computer. Agent Slagle said that Defendant acknowledged taking photographs of S.S. in various stages of undress but maintained that they were "just kind of playing around."

Tom Evans testified that he was employed by the Knoxville Police Department and assigned to the Internet Crimes Against Children Task Force. Officer Evans stated that his assignments involved forensic examination of computers and on-line undercover investigations. Officer Evans said that he had been certified as an electronic evidence collection specialist through the International Association of Computer Investigative Specialists.

Officer Evans began the examination of Defendant's hard drive in September 2003. The examination revealed that no one had accessed Defendant's computer since it had been seized by the Campbell County Sheriff's Department. Officer Evans said that the hard drive contained a "good amount" of both adult and child pornographic digital images. Some files had been deleted from the hard drive but were recovered through the forensic examination.

Officer Evans explained that kazaa is a file sharing program that can be downloaded from the internet without charge. The kazaa program allows users to share files from their own computers

with other kazaa users, or to search for specific files possessed by other kazaa users. Once a specific file is located, it can be downloaded and saved on the user's computer. The downloaded file initially remains in a kazaa shared folder until the file is transferred to a folder which is only available to the user who initially downloaded the file. As long as the file is in a shared folder on the kazaa program, the file is available for distribution to other kazaa users.

Defendant's hard drive also contained two other file sharing programs, Linewire and Aeries. Officer Evans said that he was not familiar with the Aeries program, but the kazaa and Linewire programs were the primary file sharing programs on Defendant's computer. Officer Evans said that persons who wanted to share or obtain child pornography digital images utilized file sharing programs such as kazaa and Linewire.

Officer Evans said that the primary folder in which the child pornographic digital images were stored in Defendant's computer was entitled "Mic-Mic." Officer Evans stated that over 800 digital images of child pornography were discovered on Defendant's hard drive. Officer Evans identified three digital images as examples of the type of material contained in the file folder. Officer Evans retrieved a digital image entitled "Sick Pedo Baby F____," image number 1198, from the computer's recycle bin. The forensic examination revealed that this image had been maintained on Defendant's hard drive from June 20, 2003, until August 4, 2003, and then deleted. A second digital image, number 1173, was downloaded on July 17, 2003. A third image, identified as image number 271, had a file path name which contained a series of digital images of children who had been identified by the National Center for Missing and Exploited Children. The images were downloaded on May 12, 2003. Officer Evans said that the "Mic-Mic" folder also included video clips involving children engaged in sexual activities. Officer Evans identified one video clip with a file name of "Child Lover Little Collection Video.mpg." The State introduced four binders of photocopies of the digital images retrieved from Defendant's hard drive as exhibits.

On cross-examination, Officer Evans explained that a computer's temporary internet file records images of all web sites accessed by the user even though the user does not download any specific images or information from the site. Officer Evans acknowledged that he could not identify the individual who actually downloaded the digital images on to Defendant's computer.

On redirect examination, Officer Evans said that the pornographic images retrieved from Defendant's hard drive were specifically downloaded onto the computer and were not the inadvertent result of a web search that was saved in the computer's temporary internet file. Officer Evans stated that he did not know if the folders on Defendant's hard drive were password protected, because the task force's software allowed the folders to be accessed without a password.

Defendant testified on his own behalf. At the time of the incidents, Defendant lived with his sister, Christina Bailey, and her fiancé, Brian Waddell. K.S. and S.S. were Defendant's nieces, and Defendant usually saw the children three or four days each week. Defendant said he often photographed the children, but he denied that he ever instructed them to take off their clothes before he photographed them. Defendant acknowledged, however, that he took photographs of K.S. and

S.S. on a couple of occasions when the children were undressed for their baths. One photograph introduced as an exhibit at trial showed K.S. squatting nude over a bathtub with her feet on either side of the tub's rims. Defendant acknowledged that he took the photograph but he insisted that it was just "playful silliness."

Defendant said that he did not know who downloaded the child pornographic digital images on to his hard drive. Defendant said that he used the kazaa software program to download music and computer games from the internet. Defendant said that someone told him that kazaa assigned program users a rating depending on the amount of items downloaded. The more the user downloaded, the higher his or her rating which increased the speed by which items could be downloaded. Defendant said that a friend downloaded adult pornography onto Defendant's computer in order to increase Defendant's rating. The friend then copied the pornography to a compact disk which was the disk introduced as an exhibit at trial. As a result, Defendant was assigned a rating of ten which meant that he was able to download items through kazaa approximately four to five times faster than he was able to with his prior rating of two. Defendant stated that he did not know what was on the floppy disk taken by the investigating officers during the execution of the search warrant. Defendant said that he thought that the floppy disk belonged to Mr. Waddell.

Defendant said that his computer was located in the living room and that people other than himself used it frequently. Defendant said that on one occasion he accidently left the compact disk with the adult pornography displayed on the computer, and K.S. accidently viewed some of the images until Defendant turned off the computer. Defendant said that he consented to the search of his residence. Defendant said that he unplugged his computer and gave it to the investigating officers.

On cross-examination, Defendant acknowledged that he created the "Mic-Mic" folder on his computer, and he stated that he used the folder to store music which he had downloaded from the internet. Defendant denied that he used the folder to store digital images of child pornography or that he had ever downloaded child pornography from the internet on to his computer.

II. Dismissal of Counts Thirteen and Sixteen

The State argues on appeal that the trial court erred in dismissing counts thirteen and sixteen of the indictment because of what it found to be a material variance between these counts of the indictment and the evidence presented at trial.

Counts thirteen and sixteen of the indictment charged Defendant with:

> prior to the finding of this indictment, on or about September 12, 2003, in the County and State aforesaid, [Defendant] did unlawfully, feloniously, and knowingly possess material that includes a minor less than 18 years of age, engaged in sexual activity,

> in violation of T.C.A. § 39-17-1003, all of which is against the peace and dignity of the State of Tennessee.

Defendant raised the issue of a variance between the offenses charged in counts thirteen and sixteen in his amended motion for new trial.

At the hearing on the motion for new trial, Defendant argued that the evidence was insufficient to support the jury's finding that he possessed illegal materials on September 12, 2003, as alleged in the indictment. Defendant contended that he could not have committed the offenses on September 12, 2003, because his computer had been seized by the Campbell County Sheriff's Department on September 2, 2003, after which he no longer had possession of the pornographic material. The trial court found that:

> [t]he proof from the transcript alleges that the offenses in count 13 and count 16 occurred September 2nd of 2003, and the indictment alleges these offenses occurred September 12, 2003. The State has asked this Court to consider the evidence and that the Jury, in fact, made a ruling on this evidence, and that should be sufficient to uphold the verdict. However, this Court finds that the difference in proof and the allegations made [in] the indictment constitutes a fatal variance, and, therefore, the proper remedy on those counts [is] to dismiss the verdicts.

An accused is constitutionally guaranteed the right to be informed of the nature and cause of the accusation. U.S. Const. amend. 6, 14; Tenn. Const. art. I, § 9; *see Wyatt v. State*, 24 S.W.3d 319, 324 (Tenn. 2000). Our courts have interpreted this constitutional mandate to require an indictment to "1) provide notice to the accused of the offense charged; 2) provide the court with an adequate ground upon which a proper judgment may be entered; and 3) provide the defendant with protection against double jeopardy." *Wyatt*, 24 S.W.3d at 324 (citations omitted). Further, an indictment is statutorily required to "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment." T.C.A. § 40-13-202. The question of the validity of an indictment is one of law and, as such, our review is *de novo*. *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997).

"A variance between an indictment or a subsequent bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial." *State v. Shropshire*, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000) (citing *State v. Moss*, 662 S.W.2d 590, 592 (Tenn. 1984)). A variance is not material when substantial correspondence exists between the proof and the indictment. *Shropshire*, 45 S.W.3d at 71. When the indictment and the proof substantially correspond, the Defendant is not misled or surprised at trial, and there is protection against a second prosecution for the same offense, the variance is not considered material. *Moss*, 662 S.W.2d at 592. It is not reversible error when a defendant is sufficiently aware of the charge and is able to adequately prepare for trial. *Id*.

Tennessee Code Annotated section 40-13-207 provides that "[t]he time at which the offense was committed need not be stated in the indictment, ... unless the time is a material ingredient in the offense." In *State v. Byrd*, 820 S.W.2d 739 (Tenn. 1991), our supreme court held, "[t]he rule of law is well-established in Tennessee that the exact date, or even the year, of an offense need not be stated in the indictment or presentment unless the date or time 'is a material ingredient in the offense.'" *Id.* at 740 (quoting T.C.A. § 40-13-207). "In fact, in order to establish the legal sufficiency of that charging instrument, the State need only allege that the offense was committed prior to the finding of the indictment or presentment." *Id.*

The indictment charged Defendant with possessing pornographic material "on or about September 12, 2003," and prior to the finding of the indictment on June 14, 2004. Mr. Vann testified at trial that he seized Defendant's computer tower on September 2, 2003. Investigator Pierce testified that he received Defendant's computer hard drive, a labeled compact disk and an unlabeled floppy disk on September 12, 2003. Investigator Evans testified that Defendant's hard drive had not been accessed since it was seized pursuant to the search warrant. The evidence presented at trial showed that Defendant's hard drive had contained child pornographic images from at least May 12, 2003.

At the time of the offense, the statute under which Defendant was charged made it "unlawful for any person to knowingly possess material that includes a minor engaged in: (1) sexual activity; or (2) simulated sexual activity that is patently offensive." T.C.A. § 39-17-1003 (2004). The date of the offense is not an essential element of the crime; the gravamen of the offense is the possession itself. Defendant was aware that his computer was seized by the investigating officers on September 2, 2003, and that he was charged with possessing digital images of minors engaged in actual or simulated sexual activities on his computer. Thus, Defendant was sufficiently informed of the nature of the offense so as to adequately prepare for trial, and Defendant does not argue that he was misled or surprised at trial. Moreover, the variance is not such that it will present a danger that Defendant may be prosecuted a second time for the same offense. Defendant has once been placed in jeopardy for the possession of child pornography as charged in the indictment.

Based on the foregoing, we conclude that the variance between the date in the indictment and the proof presented at trial did not rise to the level of materiality so as to prejudice Defendant's right. Accordingly, we reverse the trial court's order dismissing the charges set forth in counts thirteen and sixteen of the indictment and reinstate Defendant's two convictions for these counts. Having said that, however, we next address Defendant's issue of multiplicity.

III. Multiplicity of Offenses

A. Multiple Offenses

Defendant argues that the possession of multiple photographs or digital images in violation of Tennessee Code Annotated section 39-17-1003 constitutes only one offense, and, that, therefore, his convictions violate the doctrine of multiplicity. The State agrees with Defendant's assertion.

The multiplicity of offenses implicates double jeopardy concerns that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, the Tennessee constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. I, §10.

"Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense." *State v. Phillips*, 924 S.W.2d 662, 665 (Tenn. 1996). In determining whether offenses are multiplicitous, the reviewing court should consider the following general principles: "1. [a] single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution; 2. [i]f each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and 3. [w]here time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act. *Id.* (footnotes omitted).

"'Additional factors such as the nature of the act; the time elapsed between the alleged conduct; the intent of the accused, *i.e.*, was a new intent formed; and cumulative punishment may be considered for guidance in determining whether the multiple convictions violate double jeopardy.'" *State v. Pickett*, 211 S.W.3d 696, 706 (Tenn. 2007) (quoting *State v. Epps*, 989 S.W.2d 742, 745 (Tenn. Crim. App. 1998)).

"The legislature has the power to create multiple 'units of prosecution' within a single statutory offense, but it must do so clearly and without ambiguity." *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn. 1997). "Should the legislature fail in this duty, the ambiguity will be resolved in favor of lenity." *Id*. (citing *State v. Davis*, 654 S.W.2d 688, 696 (Tenn. Crim. App. 1983)).

In *Pickett*, the defendant was convicted of eleven counts of the sexual exploitation of a minor in violation of Tennessee Code Annotated section 39-17-1003 (2003). The evidence presented at trial showed that one of the defendant's friends alerted police officers that he had discovered digital images of children engaged in sexual activity on the defendant's computer. The defendant's computer was seized pursuant to a search warrant, and a forensic examination of the hard drive revealed numerous images of child pornography stored in the computer's temporary internet file and in the computer's unallocated space. *Pickett*, 211 S.W.3d at 699-700. The supreme court concluded that the State had failed to establish that the legislature intended cumulative punishment. *Id*. at 706. Accordingly, "the evidence established only one offense and . . . the charges against [the defendant] were, therefore, multiplicitous." *Id*.

A similar situation was presented for review in *State v. John Ray Thompson*, No. M2002-00487-CCA-R3-CD, M2003-01824-CCA-R3-CD, 2004 WL 2964704, *17 (Tenn. Crim. App., at Nashville, Dec. 20, 2004), *no perm. to appeal filed*. The defendant was charged with, among other offenses, one count of sexual exploitation of a minor under the same statute as Defendant was charged in the case *sub judice*. The State introduced multiple photographs taken by the defendant of the victims engaging in or simulating sexual activity. On appeal, the defendant argued that the

State had failed to elect which photograph or image it was relying upon to support his conviction. *Id*., 2004 WL 2964704, at *17.

A panel of this Court concluded that Tennessee Code Annotated section 39-17-1003 provides that:

> it is a crime to "knowingly possess material" that includes a minor engaged in sexual activity. The statute defines "material" as "[a]ny picture, drawing, [or] photograph . . . or [a]ny image stored on a computer hard drive," Tennessee Code Annotated section 39-17-1002(2)(A), (C) (2003), but it does not clearly fix a punishment for the possession of each obscene item within a single transaction. Therefore, the doubt results in favor of the Defendant in that he may only be prosecuted for one crime.

Id.

In the case *sub judice*, Defendant was in possession of numerous digital images of minors engaged in actual or simulated sexual activity which were stored on his computer's hard drive at the time the computer was seized by the investigating officers pursuant to a search warrant. Based on our review of the record, and as the State concedes in its brief in light of *Pickett*, we conclude that the evidence presented at trial supports only one conviction of sexual exploitation of a minor under Tennessee Code Annotated section 39-17-1003(a)(2003).

B. Remedy

Although Defendant in his brief urged this Court to merge his convictions into one conviction of sexual exploitation of a minor, Defendant contended during oral argument that the proper remedy is for this Court to remand for a new trial. See *State v. Brown,* 992 S.W.2d 389, 392 (Tenn. 1999) (concluding that the remedy for the State's failure to satisfy the election requirement is a new trial and not a dismissal due to insufficient evidence). This argument was apparently based on the State's observation in its brief that it had not elected at trial which digital images corresponded to which count of the indictment.

The State is required to make an election of offenses "when it is pursuing convictions for discrete crimes and proof of additional discrete crimes has been introduced at trial." *State v. Hoxie*, 963 S.W.2d 737, 742 (Tenn. 1998). The election requirements ensures that "the jury focuses on and is unanimous with respect to that conviction." *Brown*, 992 S.W.2d at 392. However, an election is not necessary when the evidence, as in the case *sub judice*, supports only one conviction of sexual exploitation of a minor. *John Ray Thompson*, 2004 WL 2964704, at *17.

In this case, we have concluded that the evidence presented in this case supports only one conviction of the sexual exploitation of the minor. Thus, the issue in the case *sub judice* is not one of failure to make an election of offenses but the presence of multiplicitous convictions. The proper remedy in the face of multiple convictions following trial is the entry of only one judgment of

conviction imposing one sentence in order to avoid subjecting the defendant to multiple punishments for one offense in violation of due process principles. *Pickett*, 211 S.W.3d at 706, *State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997).

IV. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of sexual exploitation of a minor. Defendant submits that the photograph of K.S. depicted nothing suggestive of sexual activity or simulated sexual activity.

When a defendant challenges the sufficiency of the evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

At the time Defendant committed the charged offenses, Tennessee Code Annotated section 39-17-1003(a) provided that "[i]t is unlawful for any person to knowingly possess material that includes a minor engaged in: (1) sexual activity; or (2) simulated sexual activity that is patently offensive." The statute also provides that the "trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor." T.C.A. § 39-17-1003(b)(2004). "Material" includes "[a]ny picture, drawing, [or] photograph . . . or [a]ny image stored on a computer hard drive." *Id*. § 39-17-1002(2)(A), (C).

Defendant focuses his challenge to the sufficiency of the convicting evidence on the nude photograph of K.S. straddling the bathtub. We agree with Defendant that this photograph, while clearly offensive and inappropriate, does not depict K.S. engaged in actual or simulated sexual activity and thus does not meet the statutory definition of prohibited material. However, contained within the four binders introduced as exhibits at trial are numerous copies of graphic digital images of minors engaged in actual or simulated sexual activity with adults and other children. Defendant acknowledged that the computer containing the prohibited material was his, that he downloaded adult pornography using the K file sharing program, and that he had seen file names and digital

images indicative of child pornography on his computer. The jury by its verdict obviously did not find credible Defendant's explanation that someone else was responsible for placing the child pornographic images on his hard drive. Viewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of the offense of sexual exploitation of a minor. Defendant is not entitled to relief on this issue.

V. Sentencing Issues

Defendant argues that the trial court erred in denying his request for full probation and contends that the length of his sentence is excessive.

Mandy Palmiter with the Tennessee Board of Probation and Parole prepared Defendant's presentence report. Defendant was asked to give his version of the charged offenses during the preparation of the report. Ms. Palmiter stated that Defendant wrote, "My version is I didn't do it. I don't know how it happened, and I'm disgusted by it. I expect [foul] play but without proof, I get to take the blame. The truth always comes out in the end, I will just have to be patient as I can and wait."

Ms. Palmiter said that she discussed the sex offender directives with Defendant, and Defendant was concerned that he would not be able to attend his girlfriend's children's ball games and school activities. Ms. Palmiter suggested that Defendant undergo a psychosexual evaluation to address the issue. Ms. Palmiter interviewed Roxanne Sharp, K.S.'s and S.S.'s mother, because the children had seen pornography on Defendant's computer. Ms. Sharp reported that both children were in therapy as a result of the offenses and displayed problems both at home and in school.

On cross-examination, Ms. Palmiter acknowledged that she wrote in the presentence report, "The offender's actions do not indicate that he recognizes his conviction, as he continues to seek out minor children in that his girlfriend has two children." Ms. Palmiter explained that the sex offender directives, which applied to Defendant, prohibited unsupervised contact with children unless the offender was a parent or stepparent to the children. Ms. Palmiter acknowledged that she had no information that Defendant became involved with his girlfriend because of her children.

Investigator Pierce testified that he sent some of the digital images retrieved from Defendant's hard drive, including the photograph Defendant acknowledged taking of K.S., to the National Center for Missing and Exploited Children. Investigator Pierce said that the Center served as a clearinghouse for storing child pornographic images retrieved through investigations for the purpose of identifying the victims of sexual exploitation. The Center reported that fifteen of the children portrayed in the images sent by Investigator Pierce had been identified by the Center as victims. The Center also reported that the photograph of K.S. had been digitally distributed to another individual at some point in time. Investigator Pierce acknowledged that he did not have specific information that Defendant himself distributed K.S.'s photograph.

Kimbra Ippolito stated that she was employed by the Riverview Psychiatric Center and worked at the Children's Center of the Cumberlands as a licensed clinical social worker and a certified forensic interviewer. Ms. Ippolito testified that she counseled K.S., S.S., and their brother, in connection with their exposure to pornography on Defendant's computer. Ms. Ippolito described in general the impact such exposure had on children. Specifically, Ms. Ippolito stated that K.S. had seen her photograph on Defendant's computer and displayed feelings of shame, embarrassment, and guilt. Ms. Ippolito said that K.S. displayed "a lot of confusion" because these exposures happened with someone she loved and trusted and had led her to engage in some sexually reactive behavior with other children.

On cross-examination, Ms. Ippolito said that she viewed K.S.'s photograph as inappropriate. Ms. Ippolito reiterated that all three children had revealed during counseling that they had seen sexually explicit images on Defendant's computer.

Defendant testified on his own behalf. Defendant stated that he did not have any prior criminal convictions. Defendant said that he rarely drank alcohol and did not use any drugs. Defendant, who was twenty-seven years old at the time of the sentencing hearing, was employed by Vinylex Corporation. Defendant stated that he lived with his mother and stepfather in Lake City. Defendant said that he had been in a relationship with Kathy Barnes for approximately one and one-half years. Ms. Barnes had two very young children. Defendant said he would abide by any probationary conditions including the avoidance of unsupervised contact with Ms. Barnes' children. Defendant said he was willing to take a psychosexual evaluation, but Ms. Palmiter did not provide him with the names of any therapists.

Defendant acknowledged that he took the photograph of K.S. which was introduced as an exhibit at the sentencing hearing. Defendant said that he stored the photograph on his computer, but he denied that he had ever sent the photograph over the internet to someone else. Defendant said that his intention in taking the photograph was "only for fun, just playful." Defendant said that he did not download any child pornographic images from the internet for sexual purposes.

On cross-examination, Defendant acknowledged that he stayed "almost every night" at Ms. Barnes' house rather than his mother's, and that he kept his clothes and ate dinner "most of the time" at Ms. Barnes' house. Defendant said that Ms. Palmiter told him that the sex offender directives would not go into effect until he was sentenced.

Defendant said that he did not intend for K.S.'s photograph to have sexual connotations. Defendant denied that he had seen any of the child pornographic images that were retrieved from his computer's hard drive. Defendant agreed that he would not have any contact with Ms. Barnes' children if required by the conditions of his probation. Defendant acknowledged that Ms. Barnes was married and that her husband was stationed overseas in Iraq with Defendant's brother, the victims' father. Defendant said, however, that he and Ms. Barnes planned to marry "in the future."

In response to the trial court's inquiries, Defendant said that several people had access to his computer, including his sister, her fiancé, and various visitors. Defendant said that he did not monitor the use of his computer. Defendant acknowledged that his sister and Mr. Waddell told him that they had never downloaded any child pornography on to Defendant's computer. Defendant said that he had asked other people about the images found on his hard drive but could not remember all of the individuals' names. Defendant again denied that he was aware that the digital images reflected in the four binders introduced as exhibits at trial were on his computer. Defendant said it was his understanding that someone else downloaded the images from the internet and then deleted them from his computer.

At the conclusion of the sentencing hearing, the trial court found that Defendant did not have a history of criminal convictions or behavior to warrant enhancing his sentence on this basis. *See* T.C.A. § 40-35-114(2)(2003). The trial court, however, found the presence of four enhancement factors: the offense involved more than one victim; the victims were particularly vulnerable because of age or physical or mental disability; Defendant committed the offense to gratify his desire for pleasure or excitement; and Defendant abused a position of trust that significantly facilitated the commission or the fulfillment of the offense. *See id*. § 40-35-114(4), (5), (8) and (16). Based on these considerations, the trial court sentenced Defendant to two years for each conviction.

The trial court found that Defendant was not a favorable candidate for alternative sentencing. The trial court specifically found that Defendant's insistence that he had not seen the images of child pornography on his computer was not credible, and that Defendant's continued disavowal that he had done anything wrong indicated a lack of amenability to rehabilitation and indicated a need to protect society from his behavior. Accordingly, the trial court ordered Defendant to serve his sentence in confinement.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App.1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

We note that the legislature has recently amended several provisions of the Sentencing Reform Act of 1989, which became effective June 7, 2005. However, although Defendant was sentenced after the effective date of the amended Act, Defendant's crime in this case occurred prior to June 7, 2005, and Defendant did not elect to be sentenced under the provisions of the amended Act by executing a waiver of his ex post facto protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

A. Enhancement Factors

The sentencing hearing in this case was held on October 11, 2005. In April 2005, our supreme court concluded that the pre-2005 Sentencing Reform Act did not violate *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005) ("*Gomez I*"). In *Blakely*, the United States Supreme Court concluded that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000)). The United States Supreme Court subsequently vacated our supreme court's ruling in *Gomez I* and remanded the case to the supreme court for additional consideration in light of the Court's opinion in *Cunningham v. California*, 549 U.S. ___, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

Upon reconsideration, our supreme court in *Gomez II* concluded that other than a defendant's previous history of criminal convictions or criminal behavior admitted to by the defendant, the application of enhancement factors which increases the defendant's sentence over the statutorily presumptive sentence deprives the defendant of his or her Sixth Amendment right to have a jury determine whether those enhancement factors applied. *State v. Gomez*, ___ S.W.3d___, 2007 WL 2917726, at *6 (Tenn. 2007) ("*Gomez II*") (citing *Cunningham*, 127 S. Ct. at 860).

Although Defendant challenged the length of his sentence on appeal, Defendant did not base his claim on Sixth Amendment principles but rather on the misapplication of enhancement factors, none of which were based upon the presence of prior convictions. On appeal, Defendant conceded that the trial court "could have been justified" in finding that the offense involved more than one victim and that Defendant abused a position of private trust. Defendant argued, however, that the enhancement factors based on the vulnerability of the victims and a finding that Defendant committed the offense to gratify his desire for pleasure or excitement were erroneously considered.

In *Gomez II*, our supreme court reviewed the defendants' sentencing claims under plain error anaylsis. *Gomez*, 2007 WL 2917726, at *2. Rule 52 of the Tennessee Rules of Criminal Procedure provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in a motion for new trial or assigned as error on appeal." Relief is granted under plain error review "only where five prerequisites are met: (1) the record clearly establishes what occurred in the trial

court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id*. (quoting *State v. Smith,* 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson,* 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

In the case *sub judice*, the record clearly establishes what occurred in the trial court in determining the length of Defendant's sentences, and thus the first prerequisite is met. In *Gomez II*, our Supreme Court concluded that "the trial court's application of the two other enhancement factors [not based on the defendants' prior convictions] breached a clear and unequivocal rule of law" in light of *Cunningham*. *Gomez II*, 2007 WL 2917726, at *6. Further, the trial court's determination that enhancement factors (4), (5), (8), and (16) were applicable to increase Defendant's sentences deprived him of the Sixth Amendment right to have a jury determine whether those enhancement factors applied and, thus, a substantial right of the accused was adversely affected. *See id*. At the time of Defendant's sentencing hearing, *Gomez I*, which concluded that Tennessee's sentencing structure did not violate Sixth Amendment principles, was controlling precedent. Therefore, it cannot be said that Defendant waived his Sixth Amendment claim for tactical reasons. *See id*. Finally, Defendant's sentences were enhanced based on factors other than the existence of a prior criminal record. In light of *Gomez II*, we conclude that granting Defendant relief is necessary to do substantial justice in this case.

We thus consider Defendant's challenge to the length of his sentence under *Gomez II*. The trial court determined the length of Defendant's sentence by finding the presence of four enhancement factors by a preponderance of the evidence. *See* T.C.A. § 40-35-114 (4), (5), (8) and (16) (2005). Defendant was convicted of the sexual exploitation of a minor, a Class E felony. As a Range I, standard offender, Defendant is subject to a sentence of between one and two years. T.C.A. § 40-35-112(a)(5). The presumptive sentence for a Class E felony is the minimum sentence in the range, or one year, if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c).

The trial court specifically found that Defendant did not have a prior history of criminal convictions or criminal behavior, and none of the enhancement factors used by the trial court to enhance Defendant's sentence above the presumptive minimum sentence were submitted to a jury or admitted by Defendant. Therefore, the rule in *Gomez II* precludes application of any of these factors. Accordingly Defendant's sentence must be modified to the presumptive sentence of one year.

B. Denial of Alternative Sentencing

Defendant argues that the trial court erred in not granting his request for full probation or, at a minimum, in not sentencing him to some form of alternative sentencing involving something less than full confinement. Because Defendant was convicted of a Class E felony, he is entitled to the presumption that he is a favorable candidate for alternative sentencing options and is eligible for probation. T.C.A. §§ 40-35-102(6); 40-35-303(a). However, this presumption may be rebutted by "evidence to the contrary." *State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The

following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary:"

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. *See* T.C.A. § 40-35-103(2), (4). Further, the "potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." *Id*. § 40-35-103(5).

The determination of whether a defendant is entitled to an alternative sentence and whether the defendant is entitled to full probation are different inquiries requiring different burdens of proof. *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Where a defendant is entitled to the statutory presumption of alternative sentencing, the State has the burden of overcoming the presumption of evidence to the contrary. *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). A defendant, however, is not automatically entitled to probation as a matter of law. T.C.A. § 40-35-303, Sentencing Commission Comments. Rather, the defendant must demonstrate that full probation would serve the ends of justice and the best interests of both the public and the defendant. *See State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

In determining whether to grant probation, the trial court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. *See id*.

The trial court recognized that Defendant was a candidate for alternative sentencing, but stated that:

> this presumption in my mind has been overridden by this presentence investigation, the information that was developed during this sentencing hearing, and frankly, the defendant's total lack of responsibility in – in having these lurid photographs in his possession. I don't . . . believe that he didn't know it was in there. I don't believe

> that . . . amount of information can go into a computer, and I . . . don't know in gigs, or whatever that is, how much that is, but that's a lot of photographs. And I will not believe under any set of circumstances that the defendant did not know that [this] volume [of digital images] was on his computer, and those photographs are quite disturbing. The proof in the case, the statements by the defendant in Court, and the evidence that was developed around today's sentencing hearing lead this Court to find the defendant is not a candidate for any type of alternative sentencing.

Thus, the trial court denied Defendant's request for alternative sentencing due to Defendant's lack of candor and his refusal to take any responsibility for the offense. Lack of truthfulness is an appropriate and important consideration in determining whether an offender should be granted an alternative sentence and whether the defendant is amenable to rehabilitation. *State v. Neely*, 678 S.W.2d 48, 49 (Tenn. 1984); *Zeolia*, 928 S.W.2d at 463; *State v. Gennoe*, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992). Failure to accept responsibility for one's criminal conduct also reflects poorly on rehabilitative potential and thus, is a basis for denial of probation. *Zeolia*, 928 S.W.2d at 463 (Tenn. Crim. App. 1996).

The trial court specifically found Defendant's testimony that he had no knowledge of how the digital images of child pornography were placed on this computer not credible. Although at times repetitive, the amount of child pornographic images found on Defendant's hard drive numbered in the hundreds. Some of the photographs were of nude children in provocative poses but not engaged in actual or simulated sexual activity. However, there also was a large number of sexually graphic images involving children engaged in actual or simulated sexual activity with other children or with adults. Defendant acknowledged taking the photograph of K.S. which, while not depicting the victim engaged in sexual activity, was patently inappropriate and offensive. Defendant acknowledged that he copied the photograph to his computer. The National Center for Missing and Exploited Children confirmed that K.S.'s photograph had been digitally disseminated to another individual.

After a thorough review of the record, we conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing and ordering Defendant to serve his sentence in confinement. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we conclude that the trial court erred by dismissing counts thirteen and sixteen of the indictment because of a fatal variance between the evidence and the indictment. However, because Defendant's convictions of sexual exploitation of a minor are multiplicitous, we reverse and dismiss counts fourteen, fifteen, and sixteen. In light of *Gomez II*, we modify Defendant's sentence in count thirteen to one year and affirm the trial court's denial of alternative sentencing. The case is remanded to the trial court for entry of an amended judgment reflecting a conviction in count thirteen for the offense of sexual exploitation of a minor with

imposition of one year in confinement. The trial court shall also enter amended judgments dismissing counts fourteen, fifteen, and sixteen.

_____

THOMAS T. WOODALL, JUDGE